

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the)	
Internet Over Cable and Other Facilities)	GN Docket No. 00-185
)	
Appropriate Regulatory Treatment for Broadband)	CS Docket No. 02-52
Access to the Internet Over Cable Facilities)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Michael Olsen
Vice President
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NJ 11747
516/803-2583

Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004
202/434-7300

August 6, 2002

Table of Contents

	Page
<u>INTRODUCTION AND SUMMARY</u>	2
<u>I. LOCAL GOVERNMENTS HAVE NO AUTHORITY TO REGULATE CABLE MODEM SERVICE</u>	6
<u>A. The Comments Confirm that Cities Are Eager to Impose a Full Panoply of Local Franchising and Fee Requirements on Cable Modem Services.</u>	6
<u>B. Allowing Cities to Regulate and Impose Fees on Cable Modem Service Would Stifle Its Development While Offering No Benefits.</u>	8
<u>C. Federal Law Bars Local Regulation of Cable Modem Services.</u>	11
<u>D. The FCC Should Reaffirm the Primacy of its National Policy Prohibiting Broadband Regulation at the Local Level by Precluding Local Regulation of Cable Modem Service.</u>	15
<u>II. THERE IS NO LEGAL OR POLICY SUPPORT FOR A FORCED ACCESS REQUIREMENT.</u>	17
<u>A. Forced Access Would Offer No Benefits to Consumers and Would Impede the Development and Deployment of Broadband Services.</u>	17
<u>1. Forced Access is Unnecessary.</u>	17
<u>2. Forced Access Would Harm Consumers by Inhibiting Broadband Service Deployment, Evolution and Innovation.</u>	19
<u>B. Forced Access Would Violate the Communications Act and the Constitution.</u>	22
<u>C. The Commission’s Broadband Policies Should Not Be Driven by Misguided and Incomplete Notions of “Regulatory Parity.”</u>	23
<u>CONCLUSION</u>	25

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the)	
Internet Over Cable and Other Facilities)	GN Docket No. 00-185
)	
Appropriate Regulatory Treatment for Broadband)	CS Docket No. 02-52
Access to the Internet Over Cable Facilities)	

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation (“Cablevision”), by its attorneys, hereby submits these reply comments in the above-referenced proceeding. The initial comments confirm that:

- the continued success of the Commission’s broadband policies will be imperiled unless the Commission acts to preclude local regulation of cable modem service; and
- the Commission’s reliance on market forces -- and rejection of government-mandated forced access requirements -- has benefited consumers by accelerating the deployment of innovative broadband services.

For the reasons set out below and in Cablevision’s initial comments, the Commission should reaffirm its policy of “vigilant restraint” and turn aside misguided calls for heavy-handed regulation of cable modem services. It should also state clearly that local governments have no authority to regulate or impose fees on cable modem service. As Commissioner Abernathy has recognized, while there is a place for local management of the public rights-of-way, there is a serious risk that “excessive regulation will hamper efforts by cable operators to upgrade plant and roll out new broadband services.”^{1/}

^{1/} *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Declaratory Ruling, GN Docket No. 00-185 (rel. March 15, 2002), Separate Statement of Commissioner Kathleen Q. Abernathy at 2.*

Regulating cable modem service at either the federal or local level is particularly inappropriate now, as the industry faces one of the greatest financial challenges in its history. As Chairman Powell has recognized, “the government has a duty and obligation to be very cognizant of the reality of the economic situation and try to understand that its expectations and its policies have to, in part, take into account in a serious and humble way what is achievable in the context of the realistic economic situation.”^{2/}

INTRODUCTION AND SUMMARY

Commenters actively involved in investing, developing and deploying broadband services and technology uniformly favor continuing the Commission’s resoundingly successful policy of refraining from regulating cable modem services. On the other hand, those who have not invested the capital and do not bear the risk associated with the success and rapid growth of these new broadband services -- such as local governments and dial-up ISPs seeking government mandated-access to cable modem infrastructure -- advocate a sharp departure from the Commission’s market-based approach, urging full-scale regulation of cable modem services that would imperil the success of the Commission’s hands-off policy. The patchwork of conflicting local requirements that would ensue from “green-lighting” local regulation, and the financial, technological and market risks that would ensure from the imposition of a common-carrier-like “forced access” regime, would fundamentally conflict with Federal policies favoring unfettered growth in new broadband Internet access services.

^{2/} Remarks of Michael K. Powell, Chairman, Federal Communications Commission, Northern Virginia Technology Council Policymakers Series Breakfast, Tysons Corner, Virginia (Feb. 27, 2002).

- **Local Regulation of Cable Modem Service by Thousands of Different Municipalities Fundamentally Conflicts with the Commission's Successful "Hands-Off" Approach and the Global Reach of the Internet.**

The Commission should be particularly wary of the eagerness of local governments to subject cable modem services to broad and detailed local regulatory and fee requirements. Extensive local regulation would thwart broadband deployment by imposing a regulatory straitjacket on cable operators, thereby depriving them of the flexibility they need to adapt and innovate as broadband technology and service offerings evolve.

Contrary to the cities' assertions, local regulation is not necessary to ensure that consumers' needs are protected and satisfied. Cable operators have made a highly risky, multi-billion dollar investment in broadband network infrastructure to offer consumers a variety of new services, many of which are still untested and evolving. The need to ensure growth in those new services to compensate for that investment provides ample incentive for operators to meet and satisfy their customers' needs fully, particularly in light of today's challenging financial climate.

Indeed, cable operators have devoted extraordinary attention and resources toward ensuring the quality of their high-speed Internet offerings, by taking steps to streamline installation and set-up, make the service user-friendly, and improve maintenance and billing. Since the filing of Cablevision's initial comments, PC Magazine's annual survey rated Optimum Online an A+ (the highest possible ranking) based on such factors as initial setup, rates, technical support, connection speed and reliability, and overall customer satisfaction^{3/} -- the very aspects that cities insist must be subject to local regulation.

^{3/} See "PC Magazine Issues Its Annual Report Card on Service & Reliability of Major Technology Companies," *PR News Wire via Dow Jones* (New York, July 11 2002).

Local governments' claims that they need to assess new franchise fees on this service in order to capture fictional "lost revenue" are similarly unjustified. Cable operators continue to pay increasing franchise fees to local franchising authorities attributable to the provision of cable services, which themselves are generating increasing revenues due to expanded services available on digital platforms.^{4/} Barring local governments from imposing an *even larger* assessment on consumers' enjoyment of cable modem services provided by cable operators is not the capture of "lost revenue;" it is a tax on the broadband consumer.

The cities' contention that the Commission's decision to classify cable modem service as an "information service" will somehow upend local rights-of-way regulation is similarly without merit. A broad preemption of local franchising and regulatory authority over an information *service* offered by a cable operator would not impede local governments from exercising their ordinary permitting and regulatory process governing excavation and maintenance of the rights-of-way, nor affect their authority to assess nominal cost-based fees related to such permitting activity. Concerns that unregulated cable modem service will lead to renegade excavation of city streets, spur placement of unsightly transformers or power stations on sidewalks, or lead to other abuses of local rights-of-way are baseless.

The Commission has full authority to preclude local regulation of cable modem service, and should exercise that authority in order to preserve and strengthen the primacy of its national "hands-off" policy toward cable modem service. Municipalities' exercise of their local franchising authority over cable operators must be undertaken in conformity with Title VI, which expressly precludes the establishment of local requirements governing information services provided by cable operators. Likewise, the cities' traditional authority to manage their local

^{4/} See NCTA Reply Comments at 26 (graph demonstrating franchise fees paid by cable operators).

rights-of-way cannot be exercised in a manner that conflicts with explicit Federal policies in Section 230, Section 706, and elsewhere in the Communications Act, each of which discourages local regulation of Internet and advanced services.

- **Forced Access Requirements Would Harm Consumer Welfare by Stifling Broadband Deployment and Innovation.**

Arguments in favor of forced access are grounded solely in speculation about what cable operators “could” or “might” do, rather than in actual behavior in the marketplace. Conjectural concerns about blocked or slowed access to unaffiliated Internet content are not a proper basis for erecting a new forced access regulatory regime. No commenter has presented evidence that any cable operator has actually engaged in such behavior. In fact, Optimum Online subscribers have complete access to the Internet’s rich variety of content, services, and service providers, all of which are enhanced by the speed and quality of Cablevision’s broadband network.

Imposing forced access regulation -- and the concomitant pricing rules, technical standards and conduct regulations that the Commission would inevitably be drawn into -- based solely upon unfounded speculation about what cable operators “might” do will result in the imposition of a relatively static regulatory scheme that thwarts the ability of cable operators to respond to marketplace developments and evolving consumer preferences. Some of the regulatory “solutions” proposed by forced access proponents, such as Amazon’s proposal for government rules covering the speed and quality of access to Internet content, would actually reduce consumer choices and service innovation. While broadband penetration has grown rapidly, most Americans do not yet subscribe to high-speed Internet service. New broadband service options, such as a wider choice of price points and access speeds or enhanced access to targeted content such as “family” or “sports” offerings, may help convert some hold-outs who have not yet realized the value of broadband.

I. LOCAL GOVERNMENTS HAVE NO AUTHORITY TO REGULATE CABLE MODEM SERVICE

A. The Comments Confirm that Cities Are Eager to Impose a Full Panoply of Local Franchising and Fee Requirements on Cable Modem Services.

The comments submitted by local governments in this proceeding demonstrate that municipalities are poised to assault the Commission's "hands-off" policy regarding regulation of cable modem service if the Commission does not act definitively to prevent them from doing so. Claims by municipalities that local regulation of cable modem service would not hinder the continued development and deployment of the service -- and indeed, would *promote* it by inspiring consumer confidence^{5/} -- do not hold water. The broad and intrusive regulatory requirements that municipal commenters claim should be imposed on cable modem service providers far exceed any permissible rights-of-way management. For example, the cities claim that they need authority over cable modem service in order to:

- **Impose additional franchise fees on cable modem users in addition to normal permitting charges for rights-of-way construction.** (nearly every local government)
- **Impose forced access requirements, including defining forced access to include Internet connections at different speeds for prescribed prices.** People of the State of California, Attachment at 19; City of New Orleans at 4; City Coalition at 30.
- **Establish government-mandated bandwidth, node size, and other network architecture requirements.** ALOAP at 14.
- **Impose customer service standards for cable modem services** (nearly every local government commenter), **including local rules governing telephone wait times, payment locations, and installation requirements.** County of Lake, Illinois at 3.
- **Establish customer service standards related to negative option marketing, billing, and refunds/rebates.** City of North Charleston and Charleston County, South Carolina at 10.
- **Prohibit "speed caps" or caching policies that enhance Internet access to popular sites and maintain high speeds.** City Coalition at 3.

^{5/} See Alliance of Local Organizations Against Preemption ("ALOAP") at 9-16; City Coalition at 23-26; District of Columbia Office of Cable Television & Telecommunications at 8; City of New Orleans at 13-14.

- **Establish administrative requirements including auditing and inspecting cable operator records, and investigating and administering consumer complaints.** Jefferson Parish, Louisiana at 3.
- **Impose construction schedules and construction-related performance requirements.** District of Columbia at 12.
- **Specify operational and construction standards that supplant the engineering judgment of the operators.** Public Cable Television Authority at 17.
- **Impose a complaint resolution process that enables local franchising authorities to impose remedies.** New Jersey Division of the Ratepayer Advocate at 2.
- **Enact and enforce local consumer protection laws for cable modem services.** Office of the Attorney General of the State of Texas at 5-6; City of New York at 35; City of Seattle at 1; Upper Darby Township Telecommunications Commission at 2; WATO at 3.
- **Set antitrust-like business rules that prohibit certain business arrangements between the cable operator and its chosen Internet service providers.** City Coalition at 27.
- **Impose and enforce local privacy obligations and standards.** City of Seattle at 2; WATO at 1-2; King County, Washington at 2.
- **Impose build-out and service area requirements.** City of Sioux City, Iowa at 2; City of South Portland, Maine at 3; County of Lake, Illinois at 3; Northwest Suburbs Cable Communications Commission at 2; Richland County at 3; Sacramento Cable Television Commission at 1; ALOAP at 18.
- **Require the submission of construction schedules and maps outlining the “socio-economic and ethnic demographics of communities” in the build-out of the system.** Sacramento Cable Television Commission at 2.
- **Prevent cable modem service providers from engaging in exclusive contracts in providing service to multi-dwelling units and others, regardless of whether such arrangements increase availability or lower costs.** City of Sioux City, Iowa at 2.

The breadth and depth of these proposed regulations fly in the face of the Commission’s attempt to create a green field for innovation and investment in broadband, and belie claims by franchising authorities that they seek only to impose a “minimal regulatory environment.”^{6/}

^{6/} See, e.g., City of Fairfax, Virginia at 2.

B. Allowing Cities to Regulate and Impose Fees on Cable Modem Service Would Stifle Its Development While Offering No Benefits.

Commenters that support imposing extensive local regulation insist that it is needed to protect the consumer from a range of potential harms, from too-high prices^{7/} to caching^{8/} to potential antitrust violations,^{9/} and that franchise fees *must* be imposed lest consumers enjoying broadband services get a “free ride” based on the fees they already pay for use and enjoyment of the cable system. These claims are based on conjecture and false premise, and cannot support the expansive and costly imposition of regulation their advocates seek.

First, contrary to local government arguments,^{10/} there is no need for local regulation to ensure that cable operators provide satisfactory customer service. Cable operators already have powerful incentives to make their high-speed offerings as user-friendly and responsive to customer needs as possible. Optimum Online is a new service, and Cablevision currently invests tremendous capital and resources to educate consumers about the value of its broadband service to attract consumers away from dial-up providers, who still hold eighty percent of all Internet access customers.^{11/} The company cannot afford to risk losing new or potential subscribers -- the consumers who the company needs to defray the huge capital expenditures that made the service possible -- through shoddy customer service. This incentive, ignored by cable critics, is far more effective at ensuring that consumers’ needs are protected than are local regulations. Indeed,

^{7/} Metropolitan Government of Nashville, Tennessee at 15.

^{8/} City Coalition at 3.

^{9/} *Id.* at 27.

^{10/} *See, e.g.,* City Coalition at 25; ALOAP at 16-18; City of Fairfax at 3-4; City of New York at 35-36; City of Philadelphia at 7.

^{11/} *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 FCC Rcd 2844, ¶ 63 (2002).

Cablevision's Optimum Online was just rated A+ by PC Magazine for superior price, product, speed, customer service and installation -- the very things cities insist need "fixing," even though none is currently regulated.^{12/}

Second, there is no need for local governments to regulate the "design" of cable modem service.^{13/} Local government arguments in support of such sweeping authority -- from forced access requirements, to speed and node penetration rules, to site access rules -- suggest an alarming intent to play an extremely intrusive role in the cable modem service business. The marketplace, not city governments, should dictate the type of Internet services offered by cable operators, and the manner in which such services evolve. Regulation of any kind -- especially the piecemeal regulation of a thousand local franchising authorities -- would impede the ability of the industry to respond to consumers by locking products and services into regimes dictated by government rather than the marketplace.^{14/}

Third, the notion that that local regulation can somehow stimulate broadband deployment defies common sense and is at odds with national policy.^{15/} As Congress and the Commission repeatedly have recognized, burdensome regulation has a chilling effect on the deployment of new technologies, raises the cost of services, and diverts funds that could be used to create

^{12/} See n.3, *supra*.

^{13/} See, e.g., City Coalition at 24-26 (seeking to prohibit caps on speed or limitations on access); ALOAP at 14 (seeking to establish bandwidth, node size, and other network architecture requirements); Public Cable Television Authority at 17 (seeking to specify operational and construction standards).

^{14/} Similarly, the argument that local government authority is needed simply to preserve a forum for customer complaints, see, e.g., New Jersey Division of the Ratepayer Advocate at 2-3, is baseless. It is no more appropriate for local governments to interject themselves into customer service issues involving Internet services provided by cable operators, than it would be for them to become involved in customer service issues involving Earthlink, Amazon, or any other provider of Internet services.

^{15/} See ALOAP at 9-14; Mt. Hood Regulatory Commission at 7-9; Public Television Cable Authority at 10-15.

additional creative content, thereby discouraging new subscribers.^{16/} Further, the expansive local regulation sought by municipal commenters would have a particularly adverse effect on deployment by subjecting cable operators to a crazy quilt of differing local requirements and standards.^{17/} On Long Island alone, there are 110 local franchising authorities. If only half adopted broadband requirements, the effect on Cablevision's ability to provide service, standardize installation, render useful customer support, and maintain those services -- all while trying to focus on addressing the local cable commission or town council's cable modem priorities -- could be debilitating. Even some local governments acknowledge the burdens associated with the local franchising process "could certainly slow down the deployment of cable modem service."^{18/}

Fourth, contrary to the cities' complaint that their inability to increase and capture additional "rent" causes "lost revenues,"^{19/} the provision of Internet access services on the cable system -- like any other online service, including shopping, email, browsing -- imposes no additional burden on the rights-of-way and should not be subject to additional "rent." Cable

^{16/} See, e.g., *TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 21396 ¶¶ 105-106 (1997) (expressing concern over regulatory over-reaching by localities and the resulting discouragement of both competition and new services); *2000 Biennial Regulatory Review: Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order*, 16 FCC Rcd 22668 ¶¶ 22-15 (2001) (discussing Congress' and, consequently, the Commission's preference for de-regulation over regulation); *In The Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 ¶ 82, n.170 (1998) (discussing Congress' and the Commission's view that regulation of ISPs would stifle development of new technologies and services).

^{17/} See, e.g., *Cox Communications* at 55 ("The extraordinary burden of complying with such a patchwork of regulations could only slow the deployment of broadband services and substantially increase broadband's costs to consumers"); *Arizona Cable Telecommunications Association et al.* at 15 (separate franchise requirement would be a "unnecessary barrier[] to entry"); *NCTA* at 49.

^{18/} *District of Columbia Office of Cable Television and Telecommunications* at 9.

^{19/} See, e.g., *District of Columbia Office of Cable Television and Telecommunications* at 5; *Metropolitan Government of Nashville, Tennessee et al.* at 13; *Mt. Hood Cable Regulatory Commission* at 7; *City Council of New Orleans* at 9-14.

operators already pay substantial compensation to cities for use of local rights-of-way that far exceeds the cities' costs of managing and maintaining the rights-of-way. The upgraded facilities that the municipalities complain burden the rights-of-way -- such as additional power supplies or pedestals -- are needed to provide expanded video services and back-up power for existing cable video systems. Many of these services were required by the franchising authorities themselves. Cable modem services, which "ride" on this infrastructure but do not expand it, cannot lawfully be subject to additional local fees as "rent" for use of the rights-of-way.^{20/}

Fifth, there is no foundation to cities' claims that their ability to impose fees on and regulate cable broadband service is essential to ensuring that cable gets no "unfair advantage" over other broadband service providers.^{21/} The ILECs' broadband services offerings are not subject to local regulation, nor are broadband service offerings from satellite operators, wireless providers, or ISPs such as EarthLink. In any event, such an extraordinary arrogation of power to shape the marketplace is far beyond the cities' authority to manage the rights of way.

C. Federal Law Bars Local Regulation of Cable Modem Services.

The comments confirm that the *Notice's* tentative conclusion that local governments lack authority under Title VI to impose franchising and fee requirements on cable modem services is correct.^{22/} The comments further demonstrate that there is no merit to the argument that local governments have independent authority -- even apart from the Communications Act -- to regulate the provision of cable modem service by cable operators.

^{20/} See also nn.35, 36, *infra*, and related text.

^{21/} City Coalition at 22-23.

^{22/} See Charter at 26-32; Comcast at 29-33; Cox at 41-42; NCTA at 46-52.

Numerous commenters establish that Title VI, which sets forth the comprehensive means by which local governments may regulate and charge fees for cable operator use of the rights-of-way, prohibits the imposition of local franchising and fee requirements fees on cable modem service.^{23/} First, in contrast to the detailed enumeration of the areas fit for local regulation of video services provided by a cable operator, nothing in Title VI authorizes regulation of cable information services. To the contrary, with a minor exception not relevant here, Section 624(b)(1) precludes municipalities, “[from establishing] requirements for video programming or other information services.” When Congress enacted Title VI, it recognized that cable operators would use their cable systems to provide services in addition to cable systems.^{24/}

Second, while Section 622(a) authorizes the imposition of franchise fees on cable operators, subsection (b) limits the basis of the fee to “revenues . . . derived from the operation of the cable system to provide cable service.”^{25/} The franchise fee is a cable operator’s payment for the use of the public rights-of-way.^{26/} This is confirmed by Section 621, which directs that the grant of authority under a franchise “shall be construed to authorize the construction of a cable system over public rights-of-way. . . .” without limiting this authorization to particular services, ensuring that the grant of authority to a cable operator for a cable system cannot be constrained to the provision of cable services.^{27/}

^{23/} See *id.* Even some local governments agree that “[t]he [Declaratory] Ruling deprives localities of the right to collect franchise fees for cable modem service.” City of Fairfax at 4.

^{24/} See Charter at 26 (citing H. Rep. No. 98-934, 98th Cong., 2d Sess., at 44 (1984)).

^{25/} 47 U.S.C. § 542.

^{26/} See H. Rep. No. 98-934 at 44 (once cable operators obtain a franchise under Title VI, they may “provide any mixture of cable and non-cable service they choose”).

^{27/} 47 U.S.C. § 541(a)(2).

The cities' reliance on the 5th Circuit's *City of Dallas* decision as authority for the proposition that they retain general governmental authority to impose fees and regulations notwithstanding Title VI^{28/} is completely misplaced. The *Dallas* decision addressed only the extent to which federal law preempts local authority over OVS providers, whose authorization to use the rights-of-way was not addressed in the statute, and did not purport to address the preemptive effect of Title VI of local authority over cable operators. Further, while the *Dallas* court held that Section 621 of the Act did not *create* local franchising authority and that such authority had existed independently prior to the enactment of that provision, it simultaneously held that Section 621 "codified and restricted local governments' independently-existing authority," henceforth occupying the field and defining the scope and extent of local regulatory authority.^{29/} This left open the possibility of additional local regulation for OVS operators only, which are not franchised pursuant to Section 621, but it most definitively limited local rights-of-way authority over cable operators to those powers specifically listed in Title VI.

Third, even if, as some cities contend,^{30/} Title VI did not restrict local regulation of cable modem service, other provisions of the Communications Act clearly do. In contrast to cable video services, there is no historic or legal precedent authorizing local regulation of interstate information services provided by cable operators.^{31/} To the contrary, such regulation would be inconsistent with the Commission's long-standing policy of refraining from regulating information and enhanced services and preempting State and local policies that are inconsistent

^{28/} See, e.g., ALOAP at 26-27; City of Philadelphia at 5-6; Public Television Cable Authority at 27-29.

^{29/} *Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999).

^{30/} See ALOAP at 26-27; Metropolitan Government of Nashville at 3-9; City of New York at 4-5.

^{31/} Charter at 26-29; Comcast at 27-31.

with this deregulatory approach.^{32/} Local regulation of cable modem services would also directly conflict with the deregulatory intent of Congressional broadband policies effectuated in Section 230 and Section 706 of the Communications Act.^{33/} The Commission has full authority to preempt such conflicting local regulation under section 2(b) of the Act, which gives the Commission full authority over interstate communications services.^{34/}

Fourth, even if local governments had residual authority over cable operators' use of the rights-of-way, the courts have established that local governments are **not entitled to be compensated twice** when authorized facilities are used to provide a different or additional service.^{35/} Because cable modem services -- provided either by the cable operator or an unaffiliated ISP -- are using existing facilities in the rights-of-way, the *Gulf Power* and *Austin* decisions bar the imposition of further fees. Those cases similarly limit local regulation other than acceptable rights-of-way management. The Commission has described the range of acceptable rights-of-way management activities as those including such tasks as coordinating construction schedules and other "vital tasks necessary to preserve the physical integrity of

^{32/} See *id.*

^{33/} Even if the cities were correct that Section 622(b) only caps the amount of fees to be collected from cable service revenues -- and leaves wide open non-cable service revenues -- their attempts to escape the limits of the Internet Tax Freedom Act must fail. If, as the City of New York argues, a franchise fee imposed on cable modem service revenues is not a franchise fee subject to the constraints of Section 622, then the exemption from the Internet Tax Freedom Act for "franchise fee[s] . . . imposed pursuant to Section 622" -- relied upon by some city commenters, *see* City of New York at 26-27 -- cannot validate a fee imposed on Internet access service that would otherwise be precluded by the ITFA.

^{34/} 47 U.S.C. § 152(b).

^{35/} See, e.g., *NCTA v. Gulf Power Co.*, 122 S. Ct. 782, 786-87 (2002); *Entertainment Connections, Inc.*, 13 FCC Rcd 14277, ¶ 62 (1998) (video provider using another provider's facilities authorized to be in the rights-of-way not required to obtain duplicative franchise); *AT&T Commun. of the Southwest v. Austin*, 40 F. Supp. 2d 852, 855-56 (W.D. Tex. 1998) (no "use" of the rights-of-way occurs meriting compensation to the local government occurs when a provider offers service via facilities already authorized to be in the rights-of-way); *see also* Charter at 27-28 (describing series of cases in which courts have held that telephone companies do not need new franchises to provide lease-back video services).

streets and highways.”^{36/} Clearly, attempts to establish customer service standards, require certain connection speeds, or handle consumer complaints bear no relation to these limited permissible activities.

Indeed, allowing the “rights-of-way” tail to wag the “cable modem regulation” dog -- *i.e.*, to accede to the cities’ assertions of local authority over all services delivered by use of the public rights-of-way -- would unleash a Pandora’s box of local fees and regulation of the Internet, permitting cities to claim a share of any other information service revenues “generated” using their rights-of-way (or facilities installed in the rights-of-way). Under the cities’ theory, they could impose fees based on Earthlink subscriber revenues, Amazon sales, Pottery Barn orders, music downloads, Internet services, and all the other sales or services that occur over the Internet. Indeed, one city asserts that it “must be able . . . to collect franchise fees from all income derived from a cable or information service delivered through [its] public rights-of-way.”^{37/}

D. The FCC Should Reaffirm the Primacy of its National Policy Prohibiting Broadband Regulation at the Local Level by Precluding Local Regulation of Cable Modem Service.

Because both the level and scope of local regulation contemplated by the cities fundamentally conflicts with the Commission’s national policy regarding cable modem service,

^{36/} See *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief*, Memorandum Opinion and Order, 12 FCC Rcd 21396, ¶ 103 (1997).

^{37/} City of Bakersfield at 1. Some cites may contend that this contention carries their claim too far, and that their authority to tax and assess fees on services provided over the cable platform extends only to services provided by the cable operator itself. To the extent this is true, it would create the kind of discriminatory regulatory nonsense that the Commission has pledged to unwind: cable operators would pay for providing ISP services on the cable platform, but third party ISPs would not; cable operators would pay for giving consumers access to on-demand media content, but third party providers like Internetainer or others would not, etc.

the Commission should confirm that the Communications Act and its rules “occupy the field”^{38/} in this area, and preempt local regulation of this service.

Contrary to assertions by ALOAP and others,^{39/} the Commission has full authority under Title I to preempt local regulation of cable modem service.^{40/} ALOAP’s argument that Title I is limited in scope and thus the Commission’s authority “cannot be exercised in a way that contradicts the intent of Congress as expressed in the structure of the rest of the Communications Act”^{41/} ignores the record. As many commenters note, the “intent of Congress” is most clearly shown in the provisions of the Communications Act that forbid local regulation of intrastate information services and state a clear policy to keep the Internet “unfettered” by regulation.^{42/}

^{38/} See, e.g., *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

^{39/} ALOAP at 32-37; City of New York at 17; Public Television Cable Authority at 7-11; Vermont Public Service Board at 21-22.

^{40/} 47 U.S.C. § 152(b) (granting the Commission jurisdiction over interstate services); 47 U.S.C. § 154(i) (granting the Commission authority to adopt rules “not inconsistent with this Act, as may be necessary in the execution of its functions”); see *FCC v. WNCN Listeners’ Guild*, 450 U.S. 582, 596 (1981).

^{41/} ALOAP at 34.

^{42/} See, e.g., Charter at 26-29; Comcast at 27-31.

II. THERE IS NO LEGAL OR POLICY SUPPORT FOR A FORCED ACCESS REQUIREMENT

A. Forced Access Would Offer No Benefits to Consumers and Would Impede the Development and Deployment of Broadband Services.

1. Forced Access is Unnecessary.

Both cable and non-cable commenters demonstrate that Commission imposition of a forced access requirement would be unnecessary and counterproductive.^{43/} First, there is no “market failure” in the high-speed Internet services market that warrants regulatory intervention. Cable modem service faces vigorous competition from DSL, satellite and other broadband providers.^{44/} The availability of substitutes for cable modem service continues to compel cable operators to offer their subscribers the service they want, or risk stagnant growth and lost customers.

Second, the speculative harms conjured by proponents of forced access fail to justify the drastic remedy of government intervention into the marketplace. Amazon and a handful of other commenters claim that forced access is needed because cable operators might some day impede - or diminish the quality of -- access to unaffiliated content or web sites,^{45/} but they present no evidence that this has occurred or is likely to occur in any manner that would harm consumers.

^{43/} See The Media Institute at 2-9; Motorola at 5-6; SBC at 25-26; USTA at 5-6; American Cable Association (ACA) at 2-7; AOL Time Warner at 2-4; Charter Communications at 12-14; Comcast at 15-24; Cox at 6-11; AT&T at 18-22; NCTA at 14-18; High-Tech Broadband Coalition at 2-7.

^{44/} See Charter at 6-8; Comcast at 7-10; NCTA at 14-16; Cox at 16-18; ACA at 4-6.

^{45/} Amazon at 7; Vermont Public Service Board at 4, 10-11; ACLU at 3; Center for Digital Democracy *et al.* at 11-3.

Similarly, although ACLU recently sponsored a study that concluded cable operators “ha[ve] the technical ability to manipulate data transmissions in numerous ways,”^{46/} the authors of that report concede that there is no evidence that cable operators have acted in such a manner.^{47/} Indeed, in a company survey last year more than 40% of Optimum Online customers reported that they continued to access third-party online and Internet service provider sites using their high-speed connections. To disrupt 40% of its customers by impeding their access and diminishing their enjoyment of their Optimum Online service would be business suicide. Users can (and do) access any web site or content; they also frequently reconfigure their home page to that of their preferred ISP.^{48/} And other practices characterized as “concerns” in the ACLU study, such as caching, are in fact nothing more than legitimate bandwidth management techniques, which are used to reduce congestion for all subscribers and to enhance access to popular content. In the absence of any evidence that cable operators are imposing some consumer harm, imposing a “remedy” like forced access is premature and unwarranted. Regulation is designed to rectify existing harms, not hypothetical problems.^{49/}

Third, cable operators must drive demand for their service in order to recoup their tremendous investment in the upgraded plant that is necessary to provide cable modem service. This imperative ensures that cable operators will continue to provide the services that customers demand, and will -- to the extent they increase value -- continue to explore partnerships or other

^{46/} See “Technological Analysis of Open Access and Cable Television Systems,” Columbia Telecommunications Corporation (Dec. 2001).

^{47/} See “Keep broadband pipes open, group says,” *Reuters news.com* (July 10, 2002).

^{48/} Cablevision at 7; see also Comcast at 10; NCTA at 27-28.

^{49/} See, e.g., *Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, 240 F.3d 1126, 1129 (D.C. Cir. 2001) (regulation must address harms that are “real, not merely conjectural.”).

arrangements with third parties that appeal to consumers.^{50/} The comments discuss a variety of such arrangements that are already underway in several markets.^{51/}

As cable modem service develops, market forces will continue to induce cable operators to enter into agreements that provide value to their consumers where appropriate.^{52/} For the government to mandate such relationships -- which would involve the government setting business terms, prices, and connection standards, and otherwise putting itself between the cable operator and the consumer -- would seriously undermine a cable operator's ability to deploy this service in a way that maximizes its reach and potential. Such delay would be extremely damaging to the prospects for additional deployment, because investors are already impatient with cable operators' ability to recoup the more than \$50 billion in national infrastructure investment that has already been expended to support these and other advanced services.^{53/}

2. Forced Access Would Harm Consumers by Inhibiting Broadband Service Deployment, Evolution and Innovation.

Government rules cannot match the agility of the market, and the imposition of wholesale pricing, interconnection, and forced access requirements on cable broadband would exact a

^{50/} Cablevision at 7-8; NCTA at 31-33.

^{51/} Comcast at 11-13; AT&T at 14-15; Charter at 2-3.

^{52/} See, e.g., Charter at 3 (noting that future transactions with third party ISPs could take a variety of shapes, such as joint investment in front-end plant and equipment and a revenue share; sharing of advertising; payments in equity, or a percentage commission on transaction-based services).

^{53/} See "Interactive' Isn't a Word Cable Customers are Interested In," *New York Times* (May 13, 2002) at C4 ("The cable television industry has invested about \$50 billion of investors' money over the last five years to upgrade cable networks to deliver digital services. Those investors now want to see serious returns"); "Adelphia Asset Sales Could Lift Cable Stocks," *The Street.com* (May 27, 2002) ("Cable operators haven't been shy about borrowing to plow money into infrastructure upgrades and the like, but investors are now tapping their feet waiting for returns").

heavy toll on this new and evolving service.^{54/} As Motorola, a company whose interest coincides with the Commission's interest in encouraging broadband adoption, observes:

imposing a single regulatory 'solution' on the industry would be harmful because (1) some of the untried business models and technologies may be superior to the option ultimately chosen by the government, and (2) no one model can meet all of the needs of the industry or consumers.^{55/}

Because the service, and its pricing, packaging and promotion, keep changing, new and viable business models will only emerge "if cable companies and ISPs retain the flexibility to modify their arrangements in response to actual commercial experience."^{56/} Imposing a static forced access regime will curtail this experimentation.^{57/}

Suggestions by Amazon and others that the government mandate uniform treatment of all Internet content by cable modem service providers are also shortsighted.^{58/} Such a policy could hurt consumers by curbing product innovation and differentiation designed to increase demand for broadband. As the broadband services market evolves, there may be valuable and additional optional product offerings made available to consumers that highlight certain content in order to appeal to different consumer needs and interests. For example, some parents might favor an option in which their children's computer is capable of accessing only Internet content that is appropriate for children. Other consumers might choose to subscribe only to streamlined access

^{54/} Motorola at 6-7; Charter at 4-5 (discussing constantly changing consumer demand for and expectations of Internet service).

^{55/} Motorola at 6-7.

^{56/} AT&T at 18; *see also* High Tech Broadband Coalition at 5 ("the Commission must proceed cautiously to ensure that its regulatory regime does not disrupt the development of competition in broadband markets or skew economically efficient decision-making by both potential providers and consumers of broadband services").

^{57/} *See id.*

^{58/} Amazon at 9-10 (calling for rules that "bar broadband ISPs from intentionally providing different levels of access or service to particular websites").

to select content if there were speed and service advantages associated with such a service offering. Cox, for instance, is exploring ways to provide consumers with multiple service offerings, with a wider range of prices and speeds.^{59/} Although Amazon claims its proposal to lock in an “openness” policy would promote “consumer choice,”^{60/} it actually might constrain choice and innovation. At any rate, until there is a palpable consumer harm that results from introduction of varied and differentiated broadband access products, imposing “remedies” against cable modem providers to assure Amazon’s view of the world is premature and unwarranted.^{61/}

Moreover, regulation of the type envisaged by its proponents is just the beginning. As some commenters note, forced access requirements also risk unleashing a “mission creep” of increased regulation that likely would involve dictating and enforcing the rates, terms and conditions of such access (or, at a minimum, judging the reasonableness of those terms and rates offered by cable operators).^{62/} Indeed, this dynamic is already evident in the few cases in which the government has imposed access requirements. For example, an ISP in Texas recently requested that regulators require AOL Time Warner to either lower its wholesale rate *or raise its retail rate* for high-speed Internet access (and curtail its promotional activities), because the ISP was having trouble staying competitive in the market.^{63/} Obviously, consumers do not benefit from higher rates and decreased promotions. Forced access requirements, however, would result

^{59/} Cox at 18.

^{60/} Amazon at 9-10.

^{61/} *See Time Warner Entertainment, supra*, n.49.

^{62/} NCTA at 16-18; *see also* Motorola at 7-8 (“the Canadian experience in regulating cable modem service access demonstrates the fallacy of arguments that mandated access can be accomplished with only ‘light touch’ regulation.”).

in numerous such requests for government to put its thumb on the scale of private business arrangements, embroiling regulators more deeply in the provision of broadband services business without offering any apparent benefits for consumers.

B. Forced Access Would Violate the Communications Act and the Constitution.

The comments confirm that the Commission lacks authority to impose forced access requirements on cable operators' cable modem services.^{64/} Congress specifically has instructed the Commission in sections 230 and 706 of the Communications Act to refrain from regulating information services and to ensure that the Internet remains "unfettered by Federal or State regulation."^{65/} Imposing forced access requirements under Title I would be squarely inconsistent with these expressions of Congressional intent.^{66/} Further, AOL Time Warner, AT&T and others demonstrate that a forced access requirement would raise serious constitutional concerns under both the First and Fifth Amendments.^{67/}

Contrary to the claims of Earthlink and some local governments,^{68/} there is no authority under Title II to impose a forced access requirement. The Commission already has concluded that there is no separate "transmission component" of cable modem service that can be regulated as a telecommunications service, and there is no need to revisit the issue.^{69/} Congress already

^{63/} See "Texas ISP Files a Complaint Over AOL's Low-Price Offer," *The Wall Street Journal Online* (June 27, 2002).

^{64/} See, e.g., NCTA at 5-13.

^{65/} 47 U.S.C. § 230(b)(2); see NCTA at 6-13.

^{66/} See NCTA at 7-13; AT&T at 18-20; Comcast at 15-17; Cox at 6-12.

^{67/} See AOL Time Warner at 43-47; Comcast at 17-21; AT&T at 20-22; NCTA at 13 n.29; Cox at 36-38; Cablevision at 10-11.

^{68/} See, e.g., Earthlink at 11-14; Association of Communications Enterprises at 2-7.

^{69/} *Declaratory Ruling* ¶¶ 39-41,

has specified in Title II that only ILECs are subject to network unbundling and “infrastructure sharing” obligations.^{70/}

C. The Commission’s Broadband Policies Should Not Be Driven by Misguided and Incomplete Notions of “Regulatory Parity.”

Although the ILECs acknowledge that the market is competitive and forced access requirements are unwarranted, they nonetheless argue that the Commission must impose such requirements in the name of “regulatory parity” if the Commission fails to deregulate their broadband services.^{71/} This argument fails to account for much of the regulation that already attaches to cable services at the federal, state and local level.

As numerous commenters explain, differences in regulation between cable and telephony broadband service regulation reflect the different regulatory models and competitive dynamics faced by the two businesses.^{72/} At a time when consumers were accustomed to “free” broadcast television programming, cable operators borrowed heavily and risked their own money in order to design, develop and build networks that now offer a robust array of broadband and video services. The telephone and DSL services offered by ILECs are provided over “free” wireline telephone networks that were funded and paid for by government-guaranteed rates of return. As a result, the ILECs’ cost structure is dramatically different from that of their cable competitors. Congress recognized the significance of these distinctions when it declined to impose network unbundling rules on cable operators as part of the 1996 Act and rejected a “Title VII” “regulatory parity” proposal.^{73/}

^{70/} See Cablevision at 10.

^{71/} See BellSouth at 2-9; SBC Communications at 10-15; Verizon at 17-23.

^{72/} NCTA at 31-40; Cox at 12-14; AT&T at 23-30; Comcast at 25-27.

^{73/} See, e.g., “Stevens Draft Includes ‘Title VII’ Provision; Senator Hopes to Include Language in Other Bills,” *Telecommunications Reports* (Apr. 18, 1994) at 1-2; “White House Working to Include

Moreover, ILEC assertions that cable operators operate “totally unconstrained by regulation” are simply wrong.^{74/} Cable operators face a raft of Federal and local regulations, including leased access, public, educational and government (PEG) access requirements, customer service requirements, and programming and franchise fee requirements that are wholly foreign to the giant phone companies. The “parity” sought by the ILECs is therefore one-sided, applying only to one level of government regulation -- Federal -- and only to one type of service -- high-speed Internet access, where calls for “parity” could most benefit the ILECs and burden the cable operators.^{75/}

As Comcast explains, “telcos chose to be in the business of common carriage; to indiscriminately carry information for others has been the core of their business for more than a century. Cable is fundamentally a different business because . . . cable operators control the content on their own networks.”^{76/} Having chosen to serve as common carriers and received all the accompanying benefits of such a decision, it is disingenuous for the ILECs to complain now that they are treated differently from companies that have chosen a different path.

‘Title VII’ in Telecom Bills; Hollings Says Provision ‘Isn’t Realistic At This Time,’ *Telecommunications Reports* (February 28, 1994) at 4-6. Under one version of this proposed framework, all providers of “advanced” services would have been subject to similar access and interconnection obligations. See “NARUC Adopts Package of Legislative Resolutions to Guide Negotiations on Fast-Moving Telecom Bills,” *Telecommunications Reports* (Mar. 7, 1994) at 10-15 (describing specifics of proposed Title VII and NARUC’s opposition thereto).

^{74/} SBC at 6.

^{75/} See Verizon at 17-23; BellSouth at 2-9; SBC at 10-15.

^{76/} Comcast at 26.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Cablevision's initial comments, the Commission should refrain from imposing new regulations on cable modem service and should preclude local governments from imposing franchising and fee requirements on high-speed Internet services offered over cable systems.

Respectfully submitted,

CABLEVISION SYSTEMS CORPORATION

Michael Olsen
Vice President
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NJ 11747
516/803-2583

/s/ Howard J. Symons
Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004
202/434-7300

August 6, 2002

CERTIFICATE OF SERVICE

I, Angela F. Collins, do hereby certify that on this 6th day of August, 2002, copies of the foregoing Reply Comments of Cablevision Systems Corporation were served on the following persons in the indicated manner:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Via ECFS

Sarah Whitesell
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-C4888
Washington, D.C. 20554
swhites@fcc.gov
Via E-Mail

Qualex Corporation
Portals II
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, DC 20554
qualexint@aol.com
Via E-Mail

Linda Senecal
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 2-C438
Washington, D.C. 20554
lsenecal@fcc.gov
Via E-Mail

Steve Garner
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-C468
Washington, D.C. 20554
sgarner@fcc.gov
Via E-Mail

/s/ Angela F. Collins
Angela F. Collins